No. 25-1311

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

EPIC GAMES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including claims for environmental harms and toxic exposures. Throughout its 80-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

This case is of acute interest to AAJ members, who represent individuals and small businesses in a wide variety of cases where full redress can include injunctive relief. They are fully aware that prevailing on the merits of a client's claim for redress, establishing that the client faces irreparable harm, and obtaining an injunction that gives clear notice of the prohibited conduct, can be hollow justice if the defendant can continue the same illicit harm by different means.

SUMMARY OF THE ARGUMENT

1a. The standard for determining that a party has violated a court's order, warranting a judgment of civil

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

contempt, is an important issue that arises in many substantive areas of law. Unfortunately, the Petitioner's description of the issue of law presented here differs markedly from the lower court's decision.

In this case, the district court found that the conditions Apple imposed on game developers, which kept them from steering users to websites outside of Apple's App Store to purchase digital products, violated California's Unfair Competition Law. The court enjoined Apple from "prohibiting developers from including in their apps" buttons and other features that direct customers to non-Apple purchasing websites.

The district court issued the contempt order after an extensive factual inquiry focused on Apple's noncompliance. The court found that Apple had violated the injunction by allowing developers to include the previously banned features, but imposing design restrictions that discouraged users from taking advantage of sites outside of the In-App Purchase system (IAP) and a 27% commission on sales that resulted from such steering. The Ninth Circuit Court of Appeals affirmed as to liability but remanded for a new determination of appropriate sanctions.

In its Petition for a Writ of Certiorari, Apple asserted that the Ninth Circuit upheld its contempt liability "based solely" on its violating the "spirit" of the order. The "spirit" rule, in Apple's rendition, is a free-floating requirement, divorced from the text, and providing no fair notice of what is forbidden.

In actuality, it is no more than the commonsense rule of thumb that this Court restated more than a century ago: An injunction must be read in light of its

issue and purposes. In short, context matters. A court's order may not be evaded by verbal twists.

1b. More importantly, the Ninth Circuit did not rely solely—or even primarily—on what Apple calls the "spirit" rule in this case. The district court and the court of appeals held that Apple violated the literal terms of the injunction.

In particular, the district court found that "even limited to the four corners of the Injunction, Apple violated the literal text." The court relied on the dictionary definition of "prohibit," which this Court has referenced, meaning to "prevent, or effectively stop." Likewise, the court of appeals upheld Apple's liability based on its violation of the dictionary definition of the express term "prohibit" in the injunction.

The fact that the injunction did not specifically forbid Apple from imposing a commission on out-of-app sales is rather beside the point. As the Ninth Circuit explained, Apple did not violate the injunction by charging a commission; it violated the express terms of the injunction by charging a commission that was prohibitive and made developers' efforts to steer users economically infeasible.

Specifically, the district court made a factual finding that Apple's 27% commission was so steep as to effectively prohibit developers from making use of buttons and other features to draw users away from the App Store. That fact was thoroughly litigated in the district court, resolved in Epic's favor, and upheld by the Ninth Circuit.

Moreover, that factual issue might not yet be finally decided. The Ninth Circuit reversed the district

court's sanction permitting no commissions on linked-out sales. Because only prohibitively high commissions violate the injunction, the court admonished the district court to redecide the appropriate sanction, "mindful of the threshold upon which commissions become 'prohibitive.'"

AAJ suggests, therefore, that the writ be dismissed at this time.

2. Affirmance is also warranted in this case because the parties agree as to the proper test to determine whether a defendant is in violation of an injunction. Their only dispute is a factual one: whether the court below properly applied that test in this instance.

As Apple contends, this Court has set forth the appropriate standard. A court may hold the party in civil contempt if there is "no fair ground of doubt" that the order barred the conduct at issue. It is an objective and well-settled test.

Epic agrees that this is the correct standard, as does the United States as amicus curiae. The Ninth Circuit found no ground of doubt that the injunction barred Apple from using its power over developers seeking to sell their apps for use on Apple devices to prevent them from steering users to outside websites. Such conduct comes within the dictionary definition of "prohibit." Apple does not contest that point.

Apple does dispute the finding that its 27% commission on linked-out sales was so high as to prevent developers from steering users to outside websites. Apple calculates that the "effective commission rate" for developers like Epic would be lower than 27% and

would incentivize developers to lure users away from Apple's in-app purchasing system.

This dispute with the Ninth Circuit's decision is a factual one that was litigated below and resolved against Apple. This Court should affirm.

3. In its consideration of the merits, AAJ urges this Court to preserve its longstanding principle of enforcing judicial orders whose terms are sufficiently general to preclude circumvention.

This Court has long adhered to this anti-evasion rule, refusing to allow defendants to claim compliance with an injunction while defeating it in fact. Punishing such gamesmanship is not only essential to assuring that a party facing irreparable harm receives the relief that equity demands. It also preserves the ability of the judicial branch to vindicate its own authority.

This Court has recognized that it is impossible to specifically name every way that a party might seek to circumvent an order against it. To attempt to do so simply invites defendants to try to accomplish their aims despite the injunction by engaging in ever more creative parsing of specific terms, leading to more requests to modify the injunction to plug loopholes. The law should not invite experiments in disobedience.

Decisions by the courts of appeals demonstrate the practical importance of preserving the anti-evasion rule. If a party can give itself immunity from contempt by demanding that prohibited conduct be precisely specified and then circumventing those terms, the result is hollow justice for those entitled to equitable relief.

ARGUMENT

I. APPLE'S ARGUMENT TO THIS COURT DOES NOT ADDRESS THE QUESTION ON WHICH THIS COURT GRANTED CERTIORARI.

AAJ addresses this Court with respect to an issue that faces district courts presiding over cases in many areas of substantive law: The standard for determining that a party has violated a court's order, warranting a judgment of civil contempt.

The district court in this case issued the contempt order after an extraordinarily extensive inquiry consuming nine days of hearings with testimony from party and expert witnesses and documentary evidence. *See* Pet. App. 7a–8a. The Ninth Circuit affirmed as to liability for violating the injunction, but vacated and remanded regarding sanctions. *Epic Games, Inc. v. Apple Inc.*, 161 F.4th 1162 (9th Cir. 2025). AAJ supports the arguments advanced by Epic Games in support of that decision and does not repeat them here.

Rather, AAJ suggests to this Court that the Question Presented and supporting argument in Apple's Petition on which this Court granted a writ of certiorari bear little resemblance to the decision below by the Ninth Circuit. The dispute between the parties is, instead, a factual dispute whose resolution by the lower courts has not yet concluded.

A. Apple's Petition Asserted That the Court Below Held Apple in Contempt Based Solely on Violation of the Injunction's Spirit, Not for Violation of Its Express Terms.

This long-running litigation has come before this Court previously. *See Apple Inc. v. Epic Games, Inc.*, 144 S. Ct. 681 (2024) (denying Apple's petition to review the Ninth Circuit's decision upholding the injunction at issue here, published at *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023)).

Respondent Epic makes video games including *Fortnite*, which users can play on Apple iPhones and iPads. Petitioner Apple sells games, game accessories, and other digital products in its App Store. As a condition imposed on developers of apps sold in the App Store, Apple receives up to 30% of the sales revenue. Epic believed it could compete with Apple among other ways, by offering digital games and accessories on its own website. Apple prohibited developers from using anything other than the IAP and restricted them from even telling users about alternatives. *See* Pet. App. 2a–3a.

Epic brought suit in the Northern District of California, alleging various antitrust causes of action. The district court found in Apple's favor on the Sherman Act counts, but held that Apple's Guideline Section 3.1.1, which banned developers from including in-app steering features, violated California's Unfair Competition Law. *Id.* at 3a–4a. The court therefore enjoined Apple

> from prohibiting developers from (i) including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing . . . .

Id. at 166a.

On the date the court's order became effective, Apple inaugurated its Link Entitlement Program, rescinding its previous guideline and imposing a commission of 27% on such linked-out sales. Added to processing fees of at least 3%, the impact of the commission was that each sale Epic steered to its own store would cost the company more than allowing the user to proceed to Apple's App Store. *Id.* at 82a. The new commission made Epic's plan to steer users to its store contractually permissible, but financially impossible. *Id.* at 4a–7a.

The district court found that Apple's action violated the terms of the injunction and held Apple in civil contempt. *See Id.* at 132a ("[E]ven limited to the four corners of the Injunction, Apple violated the literal text."). On appeal, the Ninth Circuit upheld the district court's finding that Apple violated the express terms of its injunction. *See id.* at 20a (holding Apple's commission "has a prohibitive effect, in violation of the Injunction."). *Id.* The court reversed in part and remanded for reconsideration of the proper sanction. *Id.* 26a.

In its Petition, Apple paid scant attention to the key word "prohibit." It did not contest the lower courts' reliance on the dictionary definition of the term, which

includes "prevent" as a synonym, particularly when referring to a non-governmental actor. Nor did Apple contest the finding that its commission might be so prohibitively costly as to effectively prevent Epic and other developers from attracting potential customers to external sites.

Instead, Apple's Petition contended that the Ninth Circuit upheld the contempt sanction based on the court's "outlier rule that a party may be held in contempt based *solely* on violating the 'spirit' of an order." Pet. 4 (emphasis added). *See also id.* at 29.

In its Opening Brief, Apple embellishes the urgency of its point, quoting this Court's cautions that contempt is a "severe remedy," Pet. Br. 20 (quoting *Taggart v. Lorenzen*, 587 U.S. 554, 561 (2019)), and even a "deadly weapon," *id.* (quoting *Int'l Longshoremen's Ass'n, Loc. 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)), that is "uniquely 'liable to abuse.'" *Id.* (quoting *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994)). The Ninth Circuit's "outlier 'spirit' rule," Apple complains, deprived it of the "basic fairness" of receiving "explicit notice of precisely what conduct is outlawed." Pet. Br. 25 (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)).

A fair reading of the Ninth Circuit's opinion discloses a very different case, one that hardly merits the Petition's drama.

B. The Ninth Circuit's "Spirit of the Injunction" Rule Is No More Than the Nearly Universal Commonsense Practice of Reading the Provisions of an Injunction in Context.

The Ninth Circuit discussed the "spirit of the injunction" in its opinion, but the term does not mean what Apple suggests. It is not a "unique outlier" that holds a party hostage to a vague unknowable requirement untethered to the injunction's text. It means no more than that, in reading that text, context matters. Most importantly, the "spirit rule" was not the basis for Apple's contempt liability.

Apple's Petition portrayed the court's holding below as based on "the Ninth Circuit's free-floating 'spirit' standard, which divorces the contempt inquiry from the order's text." Pet. 22. Apple asserts that the smoking gun in this case is the fact that "the *text* of the [i]njunction does not address commissions at all." *Id.* at 19. According to the Petition, "[t]hat [would be] the end of the inquiry under the rule in the First, Second, Third, and Fifth Circuits," *Id.* Instead, "the Ninth Circuit's rule invites a subjective, after-the-fact inquiry in which a party can be held in contempt for conduct that the order does not address." Pet. Br. 2.[2]

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[2] Apple edits the court's test to state that under the Ninth Circuit's view, "[p]arties may be held in contempt for violating the spirit of an injunction . . . even though the injunction does not mention commissions." Pet. 11–12. *See also* Pet. Br. 14 ("The Ninth Circuit held that parties can be held in contempt for vio-

Footnote continued on next page.

What Apple refers to as the "spirit rule" is little more than a widely held and commonsense rule of thumb in any endeavor involving language: Context matters. A century ago, this Court stated simply that an injunction must be read "in the light of the issues and the purpose for which the suit was brought." *Terminal R.R. Ass'n of St. Louis* v. *United States*, 266 U.S. 17, 29 (1924). *See also* Brief for the United States as Amicus Curiae Supporting Neither Party ["U.S. Br."] 18–19 ("Of course, like all legal provisions, an injunction's text should be construed reasonably and in context.").

The "spirit" rule that Apple finds fearsome was stated in its modern form by the Second Circuit in *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981 (2d Cir. 1942). There, the maker of the famous "Stetson" cowboy hat sued an imitator, also named Stetson. The original Stetson prevailed and the court ordered the imitator to include in any advertisement of its hats a notice that the company was not connected in any way with the John B. Stetson Company. The defendant "complied" by printing its own name in "headline type" while its disclaimer was barely visible

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lating the 'spirit' of an injunction, even when, as here, the injunction is silent as to the particular conduct at issue."). The Ninth Circuit actually stated that courts could find a breach of an injunction, "even though its strict letter may not have been disregarded." Pet. App. 12a (quoting *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949 (9th Cir. 2014)). The unaltered rule "assumed that the strict letter of the injunction was not violated." *Id.* As AAJ discusses in Part I.C. *infra*, the district court and the court of appeals found that Apple *did* violate the strict letter of the injunction. The "spirit rule" conjured by Apple is, at best, an irrelevant straw man.

in small print and obscured by other imagery. *Id.* at 983. The Second Circuit, echoing this Court's instruction in *Terminal R.R.* and closely foreshadowing the Ninth Circuit's language in this case, held that "it is proper to observe the objects for which the relief was granted and to find a breach of the decree in a violation of the spirit of the injunction, even though *its strict letter may not have been disregarded*." *Id.* (emphasis added).

The Third Circuit applied the same commonsense principle in *United States v. Christie Indus., Inc.*, 465 F.2d 1002 (3d Cir. 1972), where defendant was enjoined from selling "firecracker assembly-kits" containing various components. The court of appeals held that defendant, who "complied" by simply removing the word "kits" from its advertising and packaging and altering some of the containers and chemicals, violated the injunction. *Id.* at 1007. An injunction must "give fair warning of the acts that it forbids," the court stated, but it "must be read in the light of the circumstances surrounding its entry." *Id.* (citing *Stetson*, 128 F.2d at 983).

Similarly, the Seventh Circuit in *Schering Corp.* v. *Ill. Antibiotics Co.*, 62 F.3d 903 (7th Cir. 1995), held that a company violated an order not to sell an antibiotic reagent in liquid "solution" form when it instead sold the reagent in a powdered form buyers could dissolve in water. *Id.* at 906–07.

As an additional example, in this case none of the courts or parties, including Apple, even hinted that the district court's injunction might encompass the round fasteners on their shirts; they correctly and

properly assumed that the "button" in this case referred only to the term as it is used in computer apps, not because the "spirit of the injunction" so mandates, but because, inescapably, context matters. *E.g.*, Pet. Br. 42 ("In the software industry, a 'button' is defined as '[a]n area on a screen that when activated . . . causes an action to be initiated' . . . .") (quoting *Button*, *Oxford Dictionary of Computer Science* (7th ed. 2016)).

C. The Court Below Did Not Hold Apple in Contempt for Violating the Spirit of the Injunction, But Rather for Violating Its Literal Terms.

1. The Ninth Circuit did not uphold the contempt finding solely on the basis of violating the spirit of the injunction.

Setting aside its mischaracterization of the "spirit rule," Apple is not entitled to reversal because the court below did not rely on it as the basis—solely or even in part—for affirming the contempt order.

As Apple notes, the Ninth Circuit titled its discussion of the district court's decision, "The Injunction's Spirit." *See* Pet. Br. 15. It did so because that was the assignment of error raised by Apple. *See* Opening Brief for Apple Inc., *Epic Games, Inc. v. Apple Inc.*, 161 F.4th 1162 (9th Cir. 2025) (No. 25-2935), 2025 WL 3730938, at *43 (Section entitled "The Court's Civil Contempt Finding Relied on the Injunction's 'Spirit' Rather Than Its Express Terms").

Contrary to Apple's argument below, the district court did *not* find Apple in contempt based solely on

violation of the injunction's spirit. The court specifically found that "even limited to the four corners of the Injunction, Apple violated the literal text." Pet. App. 132a.

While Apple recognizes this holding, it complains that the "decision lacks any detailed textual analysis explaining how the injunction proscribed Apple's link-out commission." Pet. Br. 35. Not entirely so. The district court referenced this Court's observation in *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 697 (2022), that "to *prohibit* something means to forbid, prevent, or effectively stop it." Pet. App. 139a–40a n.66. And the district court below explained in vivid detail that Apple willfully set its commission at 27% precisely to effectively stop developers from steering potential customers. *Id.* at 136a. *See also id.* at 82a (citing an Apple executive's statement that the commission was set up so that every "linked-out transaction is going to be more expensive to any developer . . . than an IAP transaction at 30 percent").

Likewise, the court of appeals did not base its decision to uphold the district court's contempt order on the "spirit rule." The Judge Milan D. Smith, who authored the court's decision in *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935 (9th Cir. 2014), stated, "*Sea Shepherd* means what it says: parties may be held in contempt for violating the spirit of an injunction." Pet. App. 12a. However, Judge Smith was careful to qualify his statement by noting that the court "assumed that the strict letter of the injunction was not violated." *Id.* In other words, even if the "spirit rule" was the erroneous outlier that Apple asserts it is, the Ninth Circuit only looks to it in cases

where the defendant has not violated the express terms of the injunction. That is not this case.

2. The Ninth Circuit's affirmance was based on Apple's violation of the express terms of the injunction.

The court of appeals made clear that it upheld the contempt order because Apple did, in fact, violate the literal terms of the injunction. The court focused on the portion enjoining Apple from "prohibiting" developers from including features to steer users to outside sellers. Pet. App. 19a. Stating that the dispute turns on the meaning of that "key word," the court looked to its definition in Black's Law Dictionary: to "prevent, preclude, or severely hinder." *Id.*

As to whether Apple's 27% commission was sufficient to have such a "prohibitive effect, in violation of the Injunction," the court "agree[d] with the district court that it does." *Id.* at 20a. The court explained, "Apple willfully set a commission rate that in practice made all alternatives to [Apple's App Store] economically non-viable." *Id.* "Apple's commission on those [linked-out] transactions was large enough, [that] no rational developer would offer them." *Id.* And, in actuality, no developer chose to do so. *Id.*

In response to Apple's complaint that "the text of the [i]njunction does not address commissions at all," Pet. Br. 15, the court stated:

> [T]he 27% commission here violated the Injunction not because it was a commission; it violated the Injunction because it was prohibitive, and consequently, developers did not opt into

> Apple's Link Entitlement program, effectively stripping consumers of access to information about other purchase options.

Pet. App. 34a, n.9. *See also id.* at 32a ("[I]t is not true that the Injunction enjoins *any* commission and *any* fee. It bars only *prohibitive* commissions or fees.") (emphasis in original).

Apple does not dispute that its substantial commission could prevent, and thus "prohibit," developers from including features to direct users to non-Apple sites. In fact, Apple points out that this Court has itself employed the same broad definition:

> "Often enough in ordinary speech," this Court has explained, "to *prohibit* something means to 'forbid,' 'prevent,' or 'effectively stop' it, or 'make [it] impossible.'"

Pet. Br. 31 (quoting *Ysleta Del Sur Pueblo*, 596 U.S. at 697 (citing *Webster's Third International Dictionary* 1813 (1986); 7 *Oxford English Dictionary* 596 (2d ed. 1989); *Black's Law Dictionary* 1212 (6th ed. 1990))).

Apple declines to engage the court's conclusion that requiring developers to pay a 27% commission was so steep as to amount to "prohibiting" their use of steering features. Apple makes the bare assertion that "Apple's commission on link-out purchases in no way prevented developers from including in their apps 'buttons, external links, or other calls to action,'" Pet. Br. 34, and brushes off the relevance of the term, stating that the "relative costs and benefits" of external

purchasing mechanisms "are beyond the injunction's scope." Pet. Br. 37–38.

Whether Apple's commission was prohibitively costly to developers is the only disputed issue between the parties, and it is a factual one that was resolved in Epic's favor and against Apple.

Further, it is a question that lives on in the lower courts. The Ninth Circuit remanded the sanctions portion of the district court's order. The court vacated the district court's ban on all commissions and emphasized that the injunction was violated by prohibitively costly commissions. The court therefore charged the district court to be "mindful of the threshold upon which commissions become 'prohibitive.'" The district court may well make further findings regarding that factual question so that a decision by this Court upon the current record could be a mere advisory opinion.

For those reasons, AAJ suggests that dismissal for the writ is appropriate.

II. THE PARTIES AGREE ON THE PROPER TEST FOR DETERMINING WHETHER A PARTY HAS VIOLATED AN INJUNCTION.

Both Apple and Epic agree upon the proper test to determine whether a party has violated an injunction, warranting civil contempt. The only dispute regarding the Ninth Circuit's application of that standard is a factual dispute that was resolved in Epic's favor.

A. Both Parties Agree on the Proper Standard for Determining Whether Apple Violated the Injunction.

Apple contends that the appropriate standard for determining whether it violated the district court's injunction was set forth by this Court in *Taggart v. Lorenzen*:

> [A] court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

587 U.S. at 557 (emphasis in original). As Apple states, this standard reflects the practice of this Court "for over 140 years," Pet. Br. 1 (citing *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885)), and in "[m]ost federal courts." *Id.*

"But not the Ninth Circuit," Apple contends. There, "parties may be held in contempt for violating the spirit of an injunction." *Id.*

To the contrary, Epic agrees regarding the appropriate standard in this case:

> [A] court may hold a party in civil contempt for violating an order "if there is *no fair ground of doubt* as to whether the order barred the [party's] conduct."

Resp. Br. 18 (quoting *Taggart*, 587 U.S. at 557).[3]

B. The Ninth Circuit Applied the *Taggart* Standard Correctly.

Not only did the Ninth Circuit expressly look to *Taggart* as the appropriate standard, it applied that standard correctly in this case, leaving "no fair ground of doubt" that Apple's 27% commission, along with the design restrictions imposed by the Link Entitlement Program, violated the express terms of the injunction against prohibiting in-app steering.

Apple's primary argument to this Court is that,

> Because the injunction indisputably did not address link-out commissions, Apple's commission did not violate the injunction. That alone is reason enough to reverse or vacate the judgment below. A proper textual analysis ends there.

Pet. Br. 33. *See also id.* at 32 ("The injunction's text did not mention commissions.").

Apple's point is a red herring. First, the injunction did not specifically enjoin commissions because Apple had never taken commissions on linked-out sales. Apple impermissibly prohibited developers from luring away users by other means, primarily by contractually

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[3] The United States concurs, referring to *Taggart*'s "fair ground of doubt" formula as the "traditional" standard under which "civil contempt is improper unless the party's conduct is clearly covered by the order's express terms, *reasonably construed in context*." U.S. Br. 17 (emphasis added).

enforcing adherence to its developer Guideline Section 3.1.1. Second, and more importantly, the court focused on terms that *did* appear in the injunction, specifically the order against "prohibiting" developers from including features to attract users to non-Apple sites.

As AAJ discussed in Part I.C., *supra*, the Ninth Circuit ascertained the common meaning and usage of "prohibit," from Black's Law Dictionary. The term often means to forbid by law. But in the context of private actors, it means to "prevent" or "severely hinder." Pet. App. 19a. Apple was not punished with civil contempt because it imposed commissions. As the Ninth Circuit made clear, Apple violated the injunction by taking "prohibitive" commissions. Pet. App. 34a n.9.[4]

Apple could also have imposed a wide variety of conditions on developers who signed on to the Link Entitlement Program. It could have demanded a commission of 300% of the sales price, which the United States would view as prohibitive (as well as mathematically challenging). U.S. Br. 23. It could have called its cut a "service charge," another nomenclature not specified in the injunction. It could have demanded that the sales price at the non-Apple store be not greater than one dollar (so as to make every sale a loss) or double the Apple App Store price (so as to make it impossible to attract users to an outside site).

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[4] The Unites States expresses some doubt as to whether a 27% commission is effectively prohibitive. However, the government concedes that at some point, perhaps 300%, the commission is obviously prohibitive. U.S. Br. 23. The fact that no developer took advantage of the Link Entitlement Program strongly suggests that 27% was effective. In any event, the government's only disagreement with the Ninth Circuit on this point is a factual one.

To demand that the judicial decree ban Apple from preventing in-app steering by identifying every means of doing so by name is not a serious legal standard; it simply rewards experimentation with disobedience.

As AAJ explains in greater detail in Part III, *infra*, the Ninth Circuit's affirmance was consistent with this Court's anti-evasion principle, which recognizes that injunctions must identify prohibited conduct at a level of generality that provides sufficient notice, but does not invite cynical circumvention. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192–93 (1949).

Apple responds that its 27% commission would not have such an adverse impact on developers. Pet. Br. 39. It employs some mildly creative math to make out its claim that that large developers would experience an "effective commission rate . . . below 27 percent, thereby incentivizing developers to lure users away from Apple's in-app purchasing system." *Id.* at 40. The evidence supporting that factual assertion was presented to the district court and resolved against Apple.

In sum, both Apple and Epic agree that the appropriate standard for determining whether Apple violated the injunction is the standard set out by this Court in *Taggart*. The Ninth Circuit correctly applied that standard, finding that Apple "prohibited" Epic from using in-app features to steer potential customers to external sites by making profitable sales at those sites financially impossible. Apple's only dispute with the Ninth Circuit's analysis is a factual one, whether its 27% commission is so steep as to effectively prohibit developers.

Because the issues of law are not in dispute, AAJ urges this Court to affirm the judgment of the Ninth Circuit.

III. THIS COURT SHOULD PRESERVE ITS LONGSTANDING ANTI-EVASION RULE, ENFORCING PROSCRIPTIONS OF CONDUCT IN SUFFICIENTLY GENERAL TERMS TO PRECLUDE CIRCUMVENTION.

If this Court proceeds to the merits of this case, AAJ supports the arguments Epic sets forth in favor of affirmance. In particular, AAJ urges this Court to reaffirm and preserve an essential principle: An injunction of a court "is not to be evaded by indirections or formal observances which in fact defy it." *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 437 (1941). That principle must not be defeated by "subtleties of conduct." *Id.* Rather, "[e]very affirmative order in equity carries with it the implicit command to refrain from action designed to defeat it." *N.L.R.B.* v. *Deena Artware, Inc.*, 361 U.S. 398, 413 (1960) (Frankfurter, J., concurring).

The Court established this anti-evasion rule not only to assure that the party facing irreparable harm receives the relief that equity demands. More broadly, "[t]he ability to punish disobedience to judicial orders," this Court has declared, is "essential to ensuring that the Judiciary has a means to vindicate its own authority." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987). That authority is undermined if the target of the injunction can circumvent it by parsing its terms. If a party "can make himself a judge of the validity of orders," then "what the Constitution now

fittingly calls 'the judicial power of the United States' would be a mere mockery." *Id.* (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

This Court gave its anti-evasion rule its strongest articulation in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). The district court had enjoined employers from violating overtime provisions of the Fair Labor Standards Act. *Id.* at 189. They responded by setting up a new compensation system that did not take into account the number of hours employees worked, awarding bonuses to employees instead of raises, so the base salaries by which employees' overtime pay was determined would not increase, and redesignating some employees as executive or administrative personnel exempt from the overtime requirements. *Id.* at 190. The district court declined to hold the employers in civil contempt on the ground that, although these actions were clearly designed to circumvent the injunction, they did not violate any specific provisions of the decree. *Id.* at 191. This Court reversed.

The Court rejected the very argument advanced by Apple in this case—that it should have "immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined." *Id.* at 192. Rather than enforcing compliance with judicial orders, this Court stated, requiring an unduly narrow and specific assessment of the defendant's conduct "would give tremendous impetus to [a] program of experimentation with disobedience of the law." *Id.*

Requiring the precise specificity that Apple demands here, the *McComb* Court recognized, would simply invite a creative defendant to continue to adopt

a different course of action not specifically identified in the injunction. That would require the court to issue a revised injunction, in turn prompting the party to invent yet another scheme to circumvent the new order. *Id.* As a result, "a whole series of wrongs is perpetrated, and a decree of enforcement goes for naught." *Id.* at 193. To preclude this kind of cynical gamesmanship, injunctions forbidding conduct in terms of "generality are often necessary to prevent further violations," particularly where the defendant has already shown "a proclivity for unlawful conduct." *Id.*

The lower courts, of course, recognize the practical importance of this rule. As the late Chief Judge Posner has pointed out, "[i]f narrow literalism is the rule of interpretation, injunctions will spring loopholes, and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes." *Schering Corp.*, 62 F.3d at 906. The lesson, as Judge Magill wrote for the Tenth Circuit, is that the conduct to be prohibited must "be described in reasonable, not excessive, detail" because "overly precise terms would permit the very conduct sought to be enjoined." *Reliance Ins. Co. v. Mast Const. Co.*, 159 F.3d 1311, 1316 (10th Cir. 1998).

The United States takes exception to the Ninth Circuit's concern, that giving a defendant the "ability to "evade [an] injunction's goals' through a different course of conduct" is necessarily a "loophole." *See* U.S. Br. 19–20 (referring to the Ninth Circuit's discussion at Pet. App. 12a).

But, as Judge Easterbrook points out, this is a challenge district courts often face when crafting injunctive relief. "The more specific the order, the more

opportunities for evasion ('loopholes')." When there are millions of possible ways to violate an injunction, "[a]ny effort to identify and prohibit one million of them would have left another million or more subject to dispute." *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th Cir. 1985).

Other examples confirm the need for a strong anti-evasion principle to aid the lower courts. In *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986), Isley's, the maker of the Klondike ice cream bar, obtained an injunction prohibiting a competitor from marketing "a five ounce chocolate-covered ice cream bar" with similar packaging. The court warned that Kraft could not "circumvent the intent of the court's order by selling a 4.9 ounce bar or a bar covered with artificial chocolate. Compliance with an injunction cannot be avoided by an overly literal or hypertechnical reading of the injunction." *Id.* at 1547–48 (citing *McComb*, 336 U.S. at 187). *See also United States v. Abboud*, No. 22-11111, 2024 WL 1654753, at *4 (11th Cir. Apr. 17, 2024) (holding that where the district court enjoined a corporation and its "employees" from selling stun guns, a defendant could not circumvent the injunction by resigning as an employee and continuing selling as a "consultant")); *Manu v. Nat'l City Bank of Ind.*, 321 F. App'x 173, 176 (3d Cir. 2009) (holding that an individual who was enjoined from filing new proceedings in the district court could not "circumvent the injunction . . . by seeking intervention in cases brought by another party."); *Broker Genius Inc. v. Gainor*, 810 F. App'x 27, 33–34 (2d Cir. 2020) (holding that a company enjoined from distributing the software app "Command Center" could be held in civil

contempt for selling an app with virtually the same features under a different name).

The applicability of this anti-evasion rule to Apple's Link Entitlement Program is obvious. AAJ urges this Court to reaffirm that important principle here.

CONCLUSION

For the foregoing reasons, AAJ asks this Court to affirm the judgment of the Ninth Circuit below.

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